Policy Title	Consent to Care and Treatment
CQC KLOE Reference	Effective

Policy

Regulation 11 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 states:

11*.—(1) Care and treatment of service users must only be provided with the consent of the relevant person.*

(2) Paragraph (1) is subject to paragraphs (3) and (4).

(3) If the service user is 16 or over and is unable to give such consent because they lack capacity to do so, the registered person must act in accordance with the 2005 Act.*

*(4) But if Part 4 or 4A of the 1983 Act** applies to a service user, the registered person must act in accordance with the provisions of that Act.*

(5) Nothing in this regulation affects the operation of section 5 of the 2005 Act, as read with section 6 of that Act (acts in connection with care or treatment).*

****** Mental Capacity Act 2005 ** Mental Health Act 1983*

This regulation reinforces a fundamental part of good practice and a general legal and ethical principle that valid consent must be obtained before starting treatment or physical investigation, or providing personal care of any kind.

Information about proposed care and treatment should include information about the risks, complications and alternatives, and be given by a person with the necessary understanding of the care and treatment for which consent is being sought, and delivered in a way in which the Client can understand.

The Agency and its care staff shall always assume that a Client has the mental capacity to give valid consent to care and treatment unless the contrary can be established and in such situations it will take all reasonable and practical steps to help the Client to make their own decisions about all elements of their care.

In the event of a lack of mental capacity, a Client's prior wishes and beliefs will be respected in coming to any decision on their behalf, and such decisions will always be made after taking into account the Client's best interests and involving others as appropriate to the circumstances.

Consent, once given, may be withdrawn.

Agency staff are provided with information, instruction and training on the subject of consent, and the Mental Capacity Act 2005 and those who disregard their duties and obligations in this regard may face disciplinary action which could, in certain circumstances, include dismissal. In extreme cases, criminal action may follow.

Procedure

Valid Consent

For consent to be valid, it must be given voluntarily and freely, without pressure or undue influence, by an appropriately informed person who has the capacity to consent to the intervention in question.

An "appropriately informed person" will be:

- The Client; or, under English law;
- Someone authorised to give consent under a Lasting Power of Attorney; or
- Someone who has the authority to make treatment decisions as a court-appointed deputy.

Acquiescence where the person does not know what the intervention entails is not "consent".

Lacking capacity to give Consent

The Code of Practice published alongside the Mental Capacity Act 2005 lists 5 key statutory principles which the Agency will observe when considering the question of capacity, or lack thereof –

1. a presumption of capacity - every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
2. the right for individuals to be supported to make their own decisions - people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
3. that individuals must retain the right to make what might be seen as eccentric or unwise decisions;
4. best interests - anything done for or on behalf of people without capacity must be in their best interests;
5. least restrictive intervention - anything done for or on behalf of people without capacity should be an option that is less restrictive of their basic rights and freedom of action - as long as it is still in their best interests.

The Act defines a person who lacks capacity to give consent as:

- A person who is unable to make a decision for themselves because of an impairment or disturbance in the functioning of their mind or brain.

It does not matter if the impairment or disturbance is permanent or temporary. A person lacks capacity if –

- They have an impairment or disturbance (for example a disability, condition or trauma, or are under the effects of drugs or alcohol) that affects the way their mind or brain works; and

- That impairment or disturbance means that they are unable to make a specific decision at the time it needs to be made.

A person is considered unable to make a decision if they cannot do one or more of the following things:

- Understand the information given to them that is relevant to the decision;
- Retain that information long enough to be able to make a decision;
- Use or weigh up the information as part of the decision making process;
- Communicate their decision – this could be talking or using sign language and includes simple muscle movements such as blinking an eye or squeezing a hand.

A person's capacity to make decisions can be affected by many factors. Some factors have long-term or permanent effects, others have only a short-term effect and some will be intermittent. Examples include:

- Stroke;
- Brain injury;
- Mental health problems;
- Dementia;
- A learning disability;
- Confusion, drowsiness or unconsciousness caused by an illness or the treatment for it;
- Substance misuse;
- An anaesthetic or sedation.

Having an illness such as Alzheimer's disease, mental health difficulties, or a learning disability does not necessarily mean that a person lacks capacity to make all decisions.

Form of Consent

The validity of consent does not depend upon the form in which it is given. Written consent merely serves as evidence of consent: if the elements of voluntariness, appropriate information and capacity have not been satisfied, a signature on a form will not make the consent valid. Equally, consent may be given verbally, (explicit consent) or non-verbally (implied or implicit consent).

If an adult with capacity makes a voluntary and appropriately informed decision to refuse consent to treatment, this decision must be respected, except in certain circumstances (for example treatment for mental disorder as defined by the Mental Health Act 1983).

Advance decisions to refuse treatment

A person may have made an advance decision to refuse particular treatment in anticipation of future incapacity (sometimes referred to as a "living will"). A valid and applicable advance decision to refuse treatment has the same force as a decision to refuse treatment.

The Mental Capacity Act 2005 puts advance decisions on a statutory basis, provided that certain requirements are met –

- The person must be 18 or over;
- The person must have the capacity to make such a decision;
- The person must make clear what treatments they are refusing;
- If the advance decision refuses life sustaining treatment it must be in writing, it must be signed and witnessed and it must state clearly that the decision applies even if life is at risk.

A person with capacity can withdraw their advance decision at any time.

Adults without Capacity

Situations will arise when it is assessed, appropriately, that an adult Client cared for by the Agency lacks the capacity to make a decision as to whether to consent to care or treatment.

In considering the relevant circumstances the Mental Capacity Act rules that the healthcare professionals (the care team) must take the following steps:

- Consider whether the Client is likely to regain capacity and if so whether the decision can wait;
- Involve the Client as fully as possible in the decision that is being made on their behalf;

As far as possible, consider:

- The person's past and present wishes and feelings (in particular if they have been written down);

- Any beliefs and values (e.g. religious, cultural or moral) that would be likely to influence the decision in question, and any other relevant factors, and the other factors that the person would be likely to consider if they were able to do so.

As far as possible consult other people if it is appropriate to do so and take into account their views as to what would be in the best interests of the person lacking capacity, especially:

- Anyone previously named by the person lacking capacity as someone to be consulted;
- Anyone engaging in caring for or interested in the person's welfare;
- Any attorney appointed under a Lasting Power of Attorney;
- Any deputy appointed by the Court of Protection to make decisions for the person.

Where consent is required, (for significant, unusual or one-off decisions) but the Client lacks the capacity to give it, then these guidelines will be followed by the Agency, and appropriate action taken.

In appropriate circumstances the Client will be asked to provide written consent to the treatment/care they are to receive.

Where the Client is incapable of signing the written consent, (owing to a physical incapacity for example) then an appropriate individual, agreed by the Client, will be asked to do this on their behalf.

Some decisions can never be made on someone else's behalf, for example about:

- Marriage;
- Civil partnership;
- Divorce;
- Sexual relationships;
- Adoption;
- Voting;
- Consent to fertility treatment.

Where consent is not given, or is withdrawn.

If an adult with capacity makes a voluntary and appropriately informed decision to refuse treatment (whether contemporaneously or in advance), this decision must be respected, except in certain circumstances as defined by the Mental Health Act 1983. This is the case even where this may result in the death of the person. A person with capacity is entitled to withdraw consent at any time, including during the performance of a procedure.

Lasting Powers of Attorney (LPA)

Clients over 18 who have capacity can appoint other people (who act as "Attorney") to make decisions about their health, welfare, money and property if, in the future, they lose the ability to do so themselves.

'Personal welfare' attorneys can make decisions about health and welfare. 'Property and affairs' attorneys can make decisions about money and other financial matters. The same person can be both, or different people can take on responsibilities for different kinds of decisions. Each LPA agreement is different.

Attorneys must act in accordance with the wishes the Client described in writing when they set up their LPA. Where an individual has been given properly constructed power of Attorney, by a Client, then this information will be stored/recorded in the Client's files/notes so that all care staff may be aware of its existence. If the conditions for attorneys to take over a person's decision-making are met, care staff will involve them in relevant assessments and decisions.

Enduring Powers of Attorney (EPA)

Lasting Powers of Attorney (LPA's) have replaced EPA's and no new EPA's can be made. EPA's, however only cover property and financial matters and EPA attorneys have no power to make other kinds of decisions, such as those about health and welfare. EPA's existing prior to the implementation of the Mental Capacity Act may continue, but should be registered with the Office of the Public Guardian. As with LPA's details of existing arrangements which remain in force will be stored/recorded in the Client's files/notes.

Independent Mental Capacity Advocate (IMCA)

IMCA's safeguard the interests of people who lack capacity to make important decisions if they have nobody except paid staff to advise, support or represent them. Referrals to an IMCA service must be made when there is no family, friend, attorney or deputy to consult and:

- Medical professionals propose serious medical treatment;
- Health service or local council staff want the person to be admitted to a hospital for more than 28 days or a care home for more than eight weeks;
- A care home or hospital wants to deprive someone of their liberty.

The Agency will seek the use of such services for Clients in appropriate circumstances.

Mental Health Act 1983

Before making an application for a person to be detained under the Mental Health Act, decision-makers are advised to consider whether they could achieve their aims safely and more effectively by using the Mental Capacity Act. The Mental Health Act, however, should be used when:

- Required medical treatment cannot be given without detention under the Act;
- The treatment cannot be given under the Mental Capacity Act (for example, where the person made a valid advance decision to refuse treatment they now require);
- The person needs to be restrained in a way not allowed under the Mental Capacity Act;
- The person is expected to regain capacity and may then refuse the treatment or part of the treatment they require;
- There is some other reason the person might not get treatment and they or someone else may suffer as a result.

Children and Young People

By virtue of section 8 of the Family Law Reform Act 1969, people aged 16 or 17 are presumed to be capable of consenting to their own medical treatment, and any ancillary procedures involved in that treatment, such as an anaesthetic. As for adults, consent will be valid only if it is given voluntarily by an appropriately informed young person capable of consenting to the particular intervention.

However, unlike adults, the refusal of a competent person aged 16/17 may in certain circumstances be overridden by either a person with parental responsibility (as defined in the Children Act 1989) or a court.

If the 16/17-year-old is capable of giving valid consent then it is not legally necessary to obtain consent from a person with parental responsibility for the young person in addition to the consent of the young person. It is, however, good practice, which the Agency will follow, to involve the young person's family in the decision-making process (unless the young person specifically wishes to exclude them) provided that the young person consents to their information being shared.

Children – under the age of 16

In the case of Gillick, the court held that children who have sufficient understanding and intelligence to enable them to understand fully what is involved in a proposed intervention will also have the capacity to consent to that intervention.

This is sometimes described as being 'Gillick competent'. A child of under 16 may be Gillick competent to consent to medical treatment, research, donation or any other activity that requires their consent.

The concept of Gillick competence is said to reflect a child's increasing development to maturity.

The understanding required for different interventions will vary considerably. Thus a child under 16 may have the capacity to consent to some interventions but not to others. The child's capacity to consent should be assessed carefully in relation to each decision that needs to be made.

In some cases, for example because of a mental disorder, a child's mental state may fluctuate significantly, so that on some occasions the child appears Gillick competent in respect of a particular decision and on other occasions does not. In cases such as these, careful consideration should be given as to whether the child is truly Gillick competent at the time that they need to take a relevant decision. If the child is Gillick competent and is able to give voluntary consent after receiving appropriate information, that consent will be valid and additional consent by a person with parental responsibility will not be required.

It is, however, good practice, which the Agency will follow, to involve the child's family in the decision-making process, provided that the child consents to their information being shared.

Where advice or treatment relates to contraception, or the child's sexual or reproductive health, it is recognised good practice that a member of the care team should try to persuade the child to inform his or her parent(s), or allow the medical professional to do so. If however the child cannot be persuaded, advice and/or treatment should still be given if the healthcare professional considers that the child is very likely to begin or continue to have sexual intercourse with or without advice or treatment, and that unless they receive the advice or treatment then the child's physical or mental health is likely to suffer.

If the child seeks advice or treatment in relation to abortion and cannot be persuaded to inform her parent(s), every effort should be made to help the child find another adult (such as another family member or a specialist youth worker) to provide support to the child.

Child lacking capacity

Where a child under the age of 16 lacks capacity to consent (i.e. is not Gillick competent), consent can be given on their behalf by any one person with parental responsibility (if the matter is within the 'zone of parental control') or by the court. As is the case where Clients are giving consent for themselves, those giving consent on behalf of child patients must have the capacity to consent to the intervention in question, be acting voluntarily and be appropriately informed. The power to consent must be exercised according to the 'welfare principle': that the child's 'welfare' or 'best interests' must be paramount.

Even where a child lacks capacity to consent on their own behalf, it is good practice to involve the child as much as possible in the decision-making process. Where necessary, the courts can overrule a refusal by a person with parental responsibility. It is recommended that certain important decisions, such as sterilisation for contraceptive purposes, should be referred to the courts for guidance, even if those with parental responsibility consent to the operation going ahead.

Records

Where a significant, unusual or one-off decision is made for a Client because they lack the capacity to make that decision for themselves at that moment in time, then that decision will be recorded. Detailed notes will also be made as to the purpose of the consent, the reasons for determining that the Client lacked the capacity to provide it, the subsequent actions, and the decision reached.

Disagreements

Disagreements and concerns over a Client's best interests and the decisions made on their behalf will inevitably happen from time to time.

Concerns should be raised with those individuals who have made assessments as to whether a Client has capacity to make decisions, and those "decision-makers" who, in such circumstances, have made decisions on the Client's behalf. Assessors should be asked to explain why they believe the person lacks capacity and provide evidence to support that conclusion. Decision-makers should be asked to explain why they think their decision is in the person's best interests and/or is consistent with any advanced decision. Assessment and decision-making processes must follow the principles of the Mental Capacity Act and its codes of practice.

Where concerns remain and/or agreement cannot be reached, the matter should be referred to the Office of the Public Guardian. Ultimately, the Court of Protection can rule on whether a person has capacity to make the decision(s) included in an assessment and on whether a particular decision is in the Client's best interests.

References to Legislation and Fundamental Standards	
Health and Social Care Act 2008 (Regulated Activities) Regulations 2014	**Regulation 11**
Fundamental Standards	**Care and treatment must only be provided with consent.**